THE
MADRAS LAW JOURNAL

II] AUGUST [1937

THE METHODS OF BRITISH JUDICIAL INTERPRETATION OF HINDU LAW SOURCES.

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III

During the long period which is covered by the Development of Hindu law through the instrumentality of the Smritis and the commentaries, we find that there are certain practices and rules which were once sanctioned by the Smritis and even much earlier, by the Vedas, but which have become obsolete or are no longer approved by public opinion and thus not enforced. The commentators, in explaining this phenomenon, have given two reasons. They have relied on the text of Yajnavalkya:

"A rule of conduct, though according to Dharma, should not be followed if it is opposed to public opinion and not conducive to heavenly happiness".

The second was that some of the Puranas have prohibited these rules from being enforced in the Kali age. In discussing the rule about unequal partition, which has become obsolete, the Mitakshara relies on the text quoted above and refers to other instances of rules of Smritis and Vedas, *viz.*, the killing and cooking of either a bull or sheep for the feast of a Srotriya and the Vedic injunction of sacrificing a cow as an offering to Mitrāvaruna, which are no longer enforced for the same reason. The Brihan-naradiya purana gives also the other following instances, *viz.*, sea-voyage, the carrying of a water-pot, the marriage of a twice-born with other castes, the practice of Niyōga, the offering of flesh in Sraddhas, the third Asrama among the four Asramas ordained for every individual, *i.e.*, Vanaprastha or retirement to a forest, the giving of a daughter once given in marriage, being still a virgin, to another, Brahmacharya for a long period, man-sacrifice, horse-sacrifice going on a long pilgrimage with intent to die, and cow-sacrifice. The

Aditya Purana, as quoted by Raghunandana in his Udvāhatatva, a treatise on marriage, quotes these instances and adds one or two more, *viz.*, the recognition of sons other than the Aurasa and the Dattaka, among the 12 kinds of sons referred to by Manu, the participation by a Brahmin of food prepared by a Sudra. A full list of the practices which once obtained but were later prohibited as Kalivarjya can be collected from the quotations found in the Smritichandrika, Hemadri, Parāsara Mādhavīya, and Nirnaya sindhu and Prof. Kane in his learned paper to the 8th All-India Oriental Conference published in the Journal of the Bombay Branch of the Royal Asiatic Society has given in an appendix all the verses so collected. (J.B.R.A.S., Vol. 12.) From a perusal of that list we find the following additional practices prohibited in modern times, (1) partaking of wine even in the Sautramani sacrifice; (2) the curtailment of *Asoucha* or death pollution to one day in the case of men of Vedic learning; (3) the permission to a Brahmin householder to take cooked food from Sudras if they are his Dasas, cowherds, hereditary friends, persons cultivating his lands on agreement to pay part of the produce. It may be noted that this permission and the rule of one day Asoucha are found in Parāsarasmriti which is said to be the prevailing Smriti for the Kali age. The fining of witnesses who depose to a dispute between father and son which was prescribed in the Sāhasa chapter of the Yajnavalkya Smriti (II, 239) is also prohibited. When we consider the fact that even the practices permitted by the Parāsarasmriti are prohibited as forbidden in the Kali age, we should conclude that the reference to the Kali age is not strictly correct but is only a way of saying that it is forbidden in accordance with the opinion of the times in which these verses were written. The expression 'forbidden in the Kali age' is only a convenient formula for saying it was opposed to the 'current public opinion'. For, it is said, they were prohibited in the beginning of the Kali age for the protection of the people. The Aditya Purana gives a reason for the authority to prohibit these practices, which are allowed by the Smritis. It says that:

> "The decision of the virtuous has like authority with the Vedas".

This is inconsistent with the theory of the Mimamsakas about the relative authority of the Vedas, the Smritis and the conduct of Sishtas. The Puranas also cannot be considered to be of equal authority with the Smritis and it is difficult to hold

that, especially in legal matters, the Puranas can be an authority at all. The text of Vyasa clearly says that:

> "When there is a conflict between the Sruti, the Smriti and the Puranas the Sruti must prevail and that in a conflict between the latter two the Smriti must prevail;"

According to tradition Vyasa is said to be the author of the Puranas. Hence we have here his own declaration (assuming that the two Vyasas are one and the same person) that the Puranas are of inferior authority. Further it has to be noted that the Puranas above referred to, *viz.*, the Brihannaradiya Purana and the Aditya Purana, do not rely on their own authority for the prohibition of these practices, but on public opinion and the conventions of the virtuous. If the theory that the rules of the Smritis were rules of law in as much as they were enforced by Courts of Justice in ancient India is accepted, it will easily account for some of these practices sanctioned by the Smritis not being enforced. When they are opposed to public opinion or rejected by the conventions of the wise, the Courts of Justice which are keenly alive to public opinion no longer enforce them, by applying them in the decision of cases. The British Courts have also, following the same principle, refused to enforce some of the rules, *viz.*, the rule relating to unequal partition, Niyoga, the practice of the recognition of sons other than the Aurasa and Dattaka, the appointed daughter and the recognition of inter-caste marriages. In *Munni Lal* v. *Shiama Sonarin*[1] and *Padam Kumari* v. *Suraj Kumari*[2] the Judges observe that whatever might have been the case in ancient times as shown by old text-books, the marriage of a Brahmin with a Kshatriya is not a lawful marriage at the present day. By parity of reasoning it may be argued in the case of some of these rules at least that, if public opinion is in favour of reverting to the old practices allowed by the Smritis, Courts of law may recognise them. Especially in the case of inter-caste marriages it may be legitimately argued that the stricter rule of prohibiting these marriages and holding them to be invalid may be relaxed in accordance with the law of the Smritis. Manu clearly recognises them, and Yajnavalkya, though not in favour of a Brahmin marrying a Sudra woman does not hold inter-caste marriages generally to be invalid and prohibited by the Sastras.

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1. (1926) I.L.R. 48 All. 670. 2. (1906) I.L.R. 28 All. 458.

But the British Courts of Justice, in accordance with their idea that the commentaries and digests are records of existing usage and as such the law is to be ascertained from them and enforced accordingly, are unable now, apart from legislation, to recognize them.

There is also the phenomenon that even after the date of the Mitakshara some of the rules sanctioned therein are not followed such as the right of females to share on partition. It is no longer enforced by Courts. (Vide *Subramanian Chetti* v. *Arunachelam Chetti*[1].)

As regards the authority of the Puranas, Mr. Sarkar Sastri in his 'Hindu Law' states as follows:

> "With respect to their authority in matters of positive law Prof. Wilson rightly observes that the Puranas are not authorities in law. They may be received in explanation or illustration but not in proof. It should be observed that the doctrine of prohibition in the Kali age of certain practices which are authorised by the Smritis is enunciated in some of the Upa-Puranas and cannot therefore be entertained by our Courts, if the Puranas are not authorities in law".

That the Puranas may also be referred to as the material sources for Dharma is mentioned by Yajnavalkya (I, 3). He mentions generally Purana and the Mitakshara in its commentary elucidates it as the Brahmapurana and the like, which will include all the eighteen Puranas. It has also to be recognised that some, at least, of the Puranas are as ancient as the Smritis. There is a clear reference to a Sloka of the Bhavishyatpurana in Apastamba's Dharma Sutra. (*Vide* Apastamba Dharma Sutra, II, 24.) There is also another reference to a Purana in Apastamba Dharma Sutra, I, 1-a, which is said to be a Puranasloka by the commentator Haradatta. In Manu there is a reference to stanzas sung by Vayu said to be recited by "Puravith" in which it is said that the seed must not be sown on that which belongs to another. This evidently refers to some old Puranasloka. The Naradasmriti quotes two slokas in dealing with the law of debts from a Purana. In Tantravartika by Kumarila Bhatta reference is made to Puranas along with the Dharmasastra as authorities on Dharma. There is also reference to some of the Puranic incidents in Manu in Chap. IX when discussing the practice of Niyoga. Manu says this practice which is reprehended by the learned among twice-born

1. (1904) I.L.R. 28 Mad. 1.

as fit for cattle, is said to have ruled among men in the days of King Vena. According to Puranic tradition Vena was the son of Prithu who was a godless king and ordered that sacrifices ought to be made to him and not to the gods. (*See* Bhagavatapuranam). He is said to have been responsible also for the confusion of castes. Since that time, Manu says, the Virtuous have censured the practice of Niyoga. As an instance of the appointed daughter, Manu in IX, 128, refers to the daughter of Daksha. In many of the Puranas there occur chapters dealing with the contents of the Smritis. The Agnipurana has appropriated the Vyavahara portion of Yajnavalkya in Chapters 253 to 258. Still, on the whole, we have to come to the conclusion that in regard to Vyavahara or Law proper, the contents of the Puranas are very meagre. In the decisions of British Courts there are occasional references to the authority of the Puranas in matters of Positive law. In *Ganga Sahai* v. *Lekhraj Singh*[1] in discussing the question whether an adoption made after the adoptee has completed the fifth year is valid reference is made to a text of the Kalika Purana quoted by the Dattaka Mimamsa of Nanda Pandita. But in that case it was held that the passage in the Kalika Purana was not proved to be authentic. Mr. Justice Mahmud at p. 289 observes:

" Somewhere in the order of precedence, either between the Srutis and the Smritis, or more probably after them, come the Puranas, which the celebrated Colebrook states, are reckoned as a supplement to the scripture, and as such, constitute a fifth Veda; and this view is supported by a passage of the sage Yajnavalkya, which lays down that 'the Vedas, along with the Puranas, the Nyaya, the Mimamsa, the Dharma Sastras and the Angas are the fourteen seats of knowledge and duty'."

In *Venkatachellam Chetti* v. *Audian*[2] Mr. Justice Muthuswami Aiyar referred to the Danadharma chapter of the Mahabharata as an authority for holding that the widow succeeding to the separate property of her husband had not an absolute estate. But there are difficulties in holding the Puranas to be material sources of Hindu law. The texts are often not reliable and are in many places obscure. Not avowedly intending to lay down rules of positive law, they are not also very accurate or precise. Except in the sense of reflecting the changes in public opinion from time to time and as also being used as instruments for effecting changes in the Smriti law according to changed conditions, it must be said

1. (1886) I.L.R. 9 All. 253. 2. (1881) I.L.R. 3 Mad. 358.

that the Puranas have very little authority in regard to positive law. The tendency of the digests of more recent date to rely on passages of the Puranas cannot obtain judicial recognition, and Courts have to curb the temptation to search for rules of law in these voluminous Puranas which are not proof against interpolations and emendations.

Custom has two means (1) actual practice; (2) usage having the force of law.

The next important subject is the judicial interpretation of custom as a source of law. In the jurisprudence of all countries custom plays an important part as a source of law. There are two ways in which custom operates as a source of law. With certain well-defined characteristics such as antiquity, uniformity, notoriety and definiteness, it must be given effect to as a source of law, even though it may be at variance with the general law of the country. Secondly, custom itself or approved usage constitutes the law in certain departments of legal relations such as the law merchant or commercial usages or land tenures, or the customary rights of irrigation between the State and ryots in India or the usages of Religious Endowments, where the only criterion is the tacit conventions of the people in regard to these matters. The former may be sub-divided into three groups, local customs, family customs and caste customs. From the beginning, the Smritis have recognised custom as a supplementary source of law, in the well-known references to Jati-dharma, Kula-dharma and Desa-dharma.

Vide Manu, Chap. VIII, S. 41.

A King who knows the sacred law, must enquire into the laws of castes, districts of guilds and of families and settle the peculiar law of Each.

Vide Manu, Chap. VIII, S. 46.

What may have been practiced by the Virtuous, by such twiceborn men as are devoted to the law, that he shall establish as law, if it is not opposed to the (customs of) countries, families and castes.

Dutt's translation. Manu, Chap. VIII, S. 46.

Whatever has been done by good men or whatever has been practised by virtuous Brahmins should be regarded as valid if these be not contrary to the laws and usages of their country, the king shall give judgment in conformity therewith. Manu treats both kinds in one

verse and both Kullukabhatta and Medatithi expressly say that they should not be opposed to the texts.

A text of Gautama says:

" Local, tribal and family customs, if not opposed to express texts are binding as law."

The latter kind of custom is also recognised as Sreni-Dharma, Naigama or Gana Dharmas. (*Vide* Yagnavalkya, II, 192). Apart from these two aspects of custom as a source of law, so far as the Smritis are concerned, there is no third aspect of custom as source of law. In the administration of the personal law of the Hindus by British Courts customs have been recognised as the only source of law in the case of the Nairs of Malabar and the Kanarese people of South Kanara and some of the agricultural tribes of the Punjab (vide *Ramkishore* v. *Jainarayan*[1]) and the Hindu law has not been applied to them. As already mentioned by me in the previous lectures, in the beginning of the administration of Justice by British Courts an attempt was made to hold that the Hindu law did not apply at all to the Tamil populations of Southern India and the aboriginal Dravidian tribes; and it was said that the rules of the Hindu law must be applied only in so far as they have been accepted as customs by these communities, and wherever these customs differed from the Hindu law, they must be recognised and enforced by the Courts as such, for it must be taken that in the process of Hinduization they must have retained some of their non-Hindu customs. This third aspect, I have already shown, is unknown to the Smritis. The theory that the Schools of Law in the different provinces such as the Bengal School of Dayabagha, the Benares School, etc., are based on the usage of the particular interpretation of Texts, obtaining in those provinces is also unknown to the Smritis and Commentaries. In discussing this subject of custom as a source of law almost all the great writers on Hindu law have always referred to the word 'Achara' occurring in the Hindu law texts as meaning custom having the force of law. Manu refers to the Sadachara of Sadhus as an authority of Dharma and similarly Yajnavalkya and other Smriti-writers. From this the conclusion is drawn that in Hindu law custom outweighs the written text of the law. Sometimes it is said that custom is the

1. (1921) 42 M.L.J. 80: L.R. 48 I.A. 405: I.L.R. 49 Cal. 120 (P.C.).

primary source of law. But it has to be observed that this is an idea remote to the minds of the Smriti-writers. Whenever they referred to Sadachara as an authority for Dharma, it was only as a determining factor in the case of matters of detail in which there are no specific rules of law to be found in the Smritis or where the interpretation and application of any existing rule of law is doubtful. By Sadachara they did not mean custom in the legal sense as distinct from the general law. The text of Vasishta clearly lays down:

> " That is Dharma which is ordained in Sruti and Smriti. When both are silent the Achara of the well-behaved (Sishtas) should prevail."

Medhatithi, the commentator of Manu, makes this clear by saying that wherever the Sruti and the Smriti are silent, the conduct of those who are learned in the Vedas is also an authority; and as an instance, he gives kankana-bandhana or the tying of the kankana in a marriage. Kulluka says:

> " By Achara is meant modes of dress, etc."

Mandlik in his introduction to the Vyavahara Mayukha, at pp. 94-96 quotes certain authorities which, he says, indicate the pre-eminence of custom and usage in the Hindu law. With the greatest respect to him we have to say that the exact significance of the quotations had been misunderstood by him.

In the quotation from the Mitakshara लोकसिद्धस्यैवानुवादकान्येव प्रायेणास्मिन्प्रकरणे वचनानि (the texts in this section, *i.e.*; on succession and partition, are mostly reiterations of what actually prevails in the world), the phrase *Lokasiddha* does not mean custom at all. It is used in contradistinction to Sastrasiddha. It means 'what pertains to the world of perception', while Sastrasiddha means 'what obtains only in Sastras'. This sentence is put in by Vijnanesvara for the purpose of refuting the argument of another commentator that the phrase पितृद्रव्याविरोधेन qualifies every kind of wealth, as otherwise, in the case of wealth obtained by friendship it will become partible on the authority of a text. Vijnaneswara says that this is really unnecessary for these rules need not be construed like the rules of Sastras, but like those which deal with the facts of the world. Similarly in the quotation from Viramitrodaya the word *Lokasiddha* has been misunderstood. As for the two quotations from Brihaspati, they only establish that Achara or charitra, where the text is silent, is one of the sources of

Dharma. It must also be noticed that by charitra is meant documentary evidence. (*Vide* Brihaspati's text चरित्रं पुस्तकरणे ||). The other quotation from Devala only establishes that the usage of a country should be respected. The quotations from the Mahabharata alone seem to indicate that usage is superior to the Sastras. But this is not an authority which can be recognised when the Smritis are clear that customs are inferior to the Smritis in authority. Hence it is that the authority of Achara is based, according to the Mimamsaka, upon the fiction of a Smriti rule or a Vedic injunction. Where the Vedic or the Smriti rule is clear, such a fiction cannot be relied upon and the custom can be no authority for the Dharma. Hence no Achara can ever be recognised which is opposed to the Veda or the Smriti. In regard to the recognition of Desa Dharmas, therefore, the Mimamsaka experienced a difficulty, for the assumption cannot be made of a Vedic injunction limited to a certain locality, as the Mimamsaka considers the reference to the people of a locality as indefinite, because all persons who come to the locality and live there may not follow the custom of the locality of their origin. Hence such a vague and indefinite custom cannot be imported in the fiction of a Vedic rule. But in regard to a family or caste custom a limited Vedic or Smriti rule may be assumed. From the foregoing it will be clear that customs relating to a class family or locality which are opposed to the specific rules of the Smritis would not have been enforced in ancient India by the Courts of Justice then. As has been already referred to, Gautama clearly says so, *vide* also the approval of Bodhayana referred to for the custom of marriage of maternal uncle's daughter in Southern India by Balambhatta. It must be also remembered that the Kula and the Jati which formed the lowest Courts in ancient India for the decision of cases in the gradation of Courts of Justice in the land were subordinate to the King's Courts. Of course, in all matters where there is no specific rule of the Smriti governing the question or in matters where the rule is doubtful or where the application of the Smriti rule has to be made on proper interpretation or in matters where the Smriti itself recognised the Jati-dharma, Desa-dharma and Kula-dharma as the deciding factor, Custom or approved usage was a source of law, and it is in this sense that the Yajnavalkya Smriti

defined a judicial proceeding as a complaint in regard to the violation of a rule of Smriti or Achara. This recognition of family, caste or local customs is peculiar to the jurisprudence of British India, for as has been pointed out by their Lordships of the Privy Council in *Abdul Hussein Khan* v. *Sona Dero*[1], "custom binding inheritance in a particular family has long been recognised in India although such a custom is unknown to this country (England) and is foreign to its spirit." The only analogy their Lordships could find was customs affecting descent or rights of inhabitance of a particular district. But even there the law in India is different from the English law. According to the Indian law inhabitants of a particular district even though they may reside outside the district may follow the customary law. (*Basant Singh* v. *Brij Raj Saran Singh*[2].) In England if the alleged custom is proved to be enjoyed by people outside the district, the custom of the district will fail. (Vide *Abdul Hussein Khan* v. *Sona Dero*[1].) In *Narasammal* v. *Balaramacharlu*[3], where the custom of the adoption of a sister's son was set up in a Brahmin family of the Telugu country Mr. Justice Holloway held that such a custom cannot even if proved to exist, operate in a Court of Justice bound to administer the law. "More peculiarly is it the duty of the Court to uphold a positive prohibition of the law, when that prohibition is itself the logical deduction from the very mature of the subject to which it applies." The effect of this judgment is that where there is a clear prohibition of Hindu law, no custom can be set up in derogation of it. Mr. Justice Holloway added one other limitation which has been disapproved by text-writers and later decisions, *viz.*, that judicial recognition is necessary before a custom can be set up. He observed, 'No custom how long so ever continued, which has never been judicially recognised can be permitted to prevail against distinct authority. In *Tara Chand* v. *Reeb Ram*[4] it was held that a custom in a single family for three generations cannot be set up as against the general law to which the family was subject. This is not customary law according to Roman jurisprudence. In *Virayya* v. *Hanumanta*[5] it was argued on the strength of usage that the adoption of the father's brother's son is not valid but His Lordship Justice Muthuswami Aiyar

1. (1917) 34 M.L.J. 48: L.R. 45 I.A. 10: I.L.R. 45 Cal. 450 (P.C.).
2. (1935) 69 M.L.J. 225: L.R. 62 I.A. 180: I.L.R. 57 All. 494 (P.C.).
3. (1863) 1 M.H.C.R. 420.
4. (1866) 3 M.H.C.R. 50.
5. (1891) I.L.R. 14 Mad. 459.

refused to engraft a rule on the Hindu law as evidenced by usage. But the tendency sometimes of the Courts to give legal force to customs which have not been proved to be ancient, definite and uniform on the supposed idea that the communities which set up the custom have never adopted the Smriti law or the Brahmanical law in its entirety is too great and unwarranted a dilution of the strict legal incidents of a custom. In *Mooka Kone* v. *Ammakutti*[1] the Full Bench of the High Court of Madras had to consider a question whether the Madura Yadava community can set up successfully a custom by which the widows of a deceased last male owner dying without issue were excluded from inheriting to his estate but his nearest Dayadis inherited his estate to the exclusion of his widows. It was held that such a custom in derogation of the Hindu law was not made out as the strict conditions of a custom were not proved and that unless these conditions are strictly satisfied, it is impossible to set it up against the general Hindu law which applies to the community. Mr. Justice Kumaraswami Sastri observed:

> " I think it is too late in the day to contend that in the case of persons professing the Hindu religion, the Hindu law as expounded in the Smritis and commentaries prevalent in the province in which disputes arise should not *prima facie* govern the parties, though it will always be open to show that such Hindu law has been either modified by custom or that the rules have not been adopted by the community who retained in that respect their original customs."

Mr. Justice Devadoss strikes a different note in considering the legal requirement of the proof of a custom at variance with the Hindu law. He says:

> " The Court should not labour under the impression that the custom pleaded is a conscious departure from or variation of the Hindu law applicable to the parties. The custom is not an exception to the general Hindu law as if the set of persons who were governed by the Hindu law agreed to adopt a course of conduct in variance with the law which governs them."

He proceeded on the supposed general doctrine that the community belonged to the Dravidian race who were never governed by the Hindu law. These observations, as I have already pointed out, open the door to the condemnation of the Judicial Committee in *Bhagwan Singh* v. *Bhagwan Singh*[2] already quoted by me in my first lecture and in the face of the Judicial Committee's observations it is difficult to say that Justice Devadoss's opinion is correct. Mr. Justice Wallace,

1. (1927) 54 M.L.J. 174: I.L.R. 51 Mad. 1 (F.B.).
2. (1899) L.R. 26 I.A. 153 at 165: I.L.R. 21 All. 412 (P.C.).

on the other hand, observes:

"They are certainly Hindus by religion. That being so, it is difficult for them to contend that they are not in the matter of the family law of inheritance governed primarily by Hindu law. They plead the suit custom which is a custom in derogation of the ordinary law of succession under Hindu law as a custom among them having the force of law and therefore to be enforced by the Courts. The onus of proving such a custom lies heavily on the defendants, and it is necessary for them to prove that the custom alleged is certain, uniform and ancient, and forms in the caste consciousness such a binding rule that disobedience of it will be felt by their castes as tantamount to disobedience of a positive law."

So early as *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar*[1] the Judicial Committee laid down the same rule. They observe as follows:—Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India. But it is of the essence of such usages modifying the ordinary law of succession that they should be ancient and invariable and it is further essential thay they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence and that they possess the antiquity and certainty on which alone their legal title to recognition depends.

That a family custom if it is modern and cannot be called immemorial usage, cannot be binding was held by the Privy Council so early as *U. Chowdhry* v. *G. Chowdhry*[2]. The same rule was also enunciated by the Judicial Committee in *Hurpurshad* v. *Sheo Dyal*[3] thus:

"A custom is a rule which in a particular family or in a particular district has by long usage obtained the force of law."

It must be ancient, certain and reasonable and being in derogation of the general rules of law, must be construed strictly

"These are in every system of jurisprudence the recognised principles of a custom having the force of law and therefore recognised by the Courts as governing the parties in any dispute."

In this view the observations of Sir Gurudas Banerji in his treatise on the Law of Marriage are not correct. He says:

"We may at any rate fairly say that in the Hindu law not only is it unnecessary to trace back the existence of a custom to any definite date, but even the indefinite condition of being ancient may in favour of some classes of customs have to be dispensed with. It certainly seems unreasonable thus

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(1872) 14 M.I.A. 570. 2. (1870) 13 M.I.A. 542.
3. (1876) L.R. 3 I.A. 259 (P.C.).

to fetter the growth of customs which are encouraged by the Hindu law and which are the means by which that law can be adapted to modern requirements".

These observations cannot be readily accepted in view of the decisions of the Judicial Committee and are also opposed to the principles of the Smritis. In *Martand Rao* v. *Malhar Rao*[1], Lord Sinha delivering the judgment of the Judicial Committee in discussing the question of a special custom of impartibility and primogeniture in respect of a zamindari held that only an estate of considerable age can be considered governed by an ancient and invariable custom and an estate of which the origin dates back only to 1796 cannot be regarded in a settlement in 1863 as governed by an ancient custom. The only workable rule under modern conditions is to apply the Hindu law to all Hindus by religion and to enforce customs in derogation of that law only if they satisfy the requirements of a valid custom having the force of law. If changes are required by a considerable body of public opinion in the Hindu law itself, the only method is to effect it by legislation. But it will be subversive of all progressive notions of administration of a legal system to entertain nebulous theories of the applicability of the Hindu law itself to different sections of Hindus—theories erected on the shifting sands of ethnological data. On the other hand, the wholesome influence of Judge-made law should be directed to bring uniformity and certainty to the application of legal rules and be chary of the recognition of all kinds of customs.

The Smritis in their course of development covered a fairly long period of nearly ten centuries and inevitably therefore in the administration of the Hindu law during that period various changes have been introduced in the law, and it would really be an interesting study to pursue the history of the development of the Smriti law from the time of the earliest Smritis and the Sutras to the most recent of them; but it is beyond the scope of the present lectures. It is not right to conclude, as Sir Gurudas Bannerjee does, that usage or custom has been the instrument by which these changes have been effected. Just as the history of legislation in a modern state for a few centuries will reflect the changes of public opinion, so the various Smritis which sprang up from time to time

1. (1927) 54 M.L.J. 397: L.R. 55 I.A. 45: I.L.R. 55 Cal. 403 (P.C.).

reflect the changes of public opinion and the adaptations of the law to the conditions of the times. It is not necessary therefore to assume that this has been done by the force of usages developing in course of time. From what Manu says about the practice of Niyoga in Chapter IX one will note that it is not because of any usage which has modified the ancient rule of Niyoga, that Manu would prohibit it but on the strength of his opinion supported by enlightened public opinion. In verse 64 he clearly states:

> "A widow must not be appointed to cohabit with any other (than her husband)"

And in verse 68 he states:

> "the virtuous censure that man who in his folly appoints a woman whose husband died, to bear children to another man".

This appears more like the enunciation of a new rule of law prohibiting Niyoga in accordance with his opinion and as reflecting the views of cultured men than the mere recording of a usage against the practice of Niyoga which has grown up and which has attained the force of law. Similarly in the Yajnavalkya Smriti the marriage of the twice-born with Sudra women which was permitted by Manu and other Smritis anterior to him is condemned (*vide* II, 56). He expressly states 'this is not my opinion.' Many more instances may be quoted from the Smritis in support of the above statement.

During the period of the digests all the Smritis were looked upon as constituting one material source of Hindu law and chronology was entirely ignored, and the various digest writers tried to deduce the rules of law by a process of interpretation and reconciliation of different texts, and in this they differed among themselves. Hence arose the different schools of law in the various provinces now recognised by the British Courts. The introductory portion of the Sarasvati Vilasa clearly shows the difficulty that was experienced on account of the conflicting opinions of the commentators, and hence, it is stated, King Prataparudradeva arranged for the establishment in a book of clear rules of law.

Mr. Justice Holloway observed in *Narasammal* v. *Balaramacharlu*[1] that:

> "A very short experience will suffice to satisfy any Judge that a Pandit will always overcome a passage of Hindu law too stubborn for other manipulation by the often baseless allegation of custom".

1. (1863) 1 M.H.C.R. 420.

This is really a misunderstanding of the practice of commentators in attempting to reconcile two conflicting texts or interpreting a doubtful text to refer to the public opinion expressed by conduct of cultured and learned men as supporting their conclusion. For this they use the word 'Achara'. This is not the setting up of any custom having the force of law contrary to a written text. It is really the opinion expressed by the conduct of the wise who are versed in law and Aryan culture which is relied upon as a determining factor to support their conclusion. As the commentator has no authority apart from the text he is commenting on and other texts of equal authority, which he is quoting, he is diffident of relying on his own interpretation as conclusive and seeks for support the opinion of the wise as expressed in their conduct when observing the rules.

The British Courts, in accordance with the great importance which they gave to custom and usage, developed the tendency to judicially recognise the many varied customs which cropped up their head during the period of Mahomedan rule, owing to the absence of the regular administration of Hindu law by the King's Courts. This tendency is specially seen in the recognition of the many customary modes of marriage by the Courts of British India. While the tendency during the period of the administration of Hindu law by Hindu Kings was for the different kinds of marriage to drop out and the higher form of marriage, *i.e.*, the Brahma form to become the more prevalent one, during the period of the British administration of the Hindu law, the kinds of marriage began to increase and many customary modes of marriage came to be recognised by the British Courts. Though originally the Brahma form was not applicable to the Kshatriya and other castes, it later became the prevalent form of marriage among all castes including the Sudras so that according to decisions the presumption is that it is in the Brahma form. While on the one side it was so, the decisions began to recognise various customary forms of marriage such as the Phul Vivaha among the Orissa Rajas, Dand marriages among the Raj Vamsies of Bengal, Santi grihita marriage among the Tippara castes, the Sarvasavadhana marriage among the Nambudris of Malabar. (*Vide* also other kinds of marriage given in Mandlik's Hindu Law, pp. 418-425.) In some of the later digests such as the

Dharmasindhu and the Samskara Kaustubha the opinion is expressed that in respect of marriage, usage should be followed. For this reliance is placed on Asvalayana Grihya Sutra, where it is stated:

"The usages of the country should be followed in marriages".

And on the text of Manu:

"that the path of the virtuous should be followed by which one's father and forefathers have gone. No sin will arise out of that".

But there is no indication of this exceptional rule in regard to marriages in the Smritis.

During the period of British administration the formation of new sects like Brahmos led to their marriages being recognised. They are strictly monogamous and performed according to the rites of the Brahmo Church, the new Samhita as it is called in *Sonaluxmi* v. *Vishnu Prasad*[1]. Statutory marriages as under the Special Marriage Act, 1872, and Sikh Marriages under the Anand Marriage Act, 1909, are also recognized.

In the application of the rules of the Smritis the British Courts have adopted the principle of (1) determining whether a text is merely directory or recommendatory, and (2) the doctrine of *factum valet*. In *Srimati Uma Deyi* v. *Gokoolanund Das Mahapatra*[2] the question arose as regards the validity of the adoption of a distant Sapinda in preference to the brother's son on the ground that the Smritis were a mixture of religion, law and morality. The Judicial Committee held that the rule of the Dattaka Mimamsa giving preference to the brother's son, is only directory and the adoption is not invalid. In the case of an adoption of an only son the question of its validity led to serious controversy among the various High Courts. But the Judicial Committee in *Gurulingaswami* v. *Ramalakshmamma*[3], decided that the text of Vasishta was only directory so far as the adoption of an only son was concerned. Similarly the texts prohibiting marriages with the daughters, of one's guru or with girls having hideous names or brotherless girls have been held to be merely directory. In the case of Yajnavalkya's text on marriage referring to the necessity of the girl being अरोगिणी and भ्रातृमती, the Mitakshara enunciates the directory character of it and says that even if she is suffering from disease and brotherless, she becomes the legal wife

1. (1903) I.L.R. 28 Bom. 597.
2. (1878) L.R. 5 I.A. 40: I.L.R. 3 C. 587 (P.C.).
3. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 at 425 (P.C.).

भार्यात्वे उत्पन्ने and in the case of Sapindas, Samanagotras and Samanapravaras the Mitakshara says she does not become a wife at all भार्यात्वमेवनोत्पद्यते. So also the marriages of a step-mother's sister, paternal uncle's wife's sister, wife's sister or their daughter were held valid as the texts prohibiting such marriages were held to be directory only. (*Raghavendra Rao* v. *Jayaram Rao*[1] and *Sri Rajah Vellanki Ramakrishna Rao* v. *Subbamma Rao*[2]). In *Raghavendra Rao* v. *Jayaram Rao*[1] for holding that the text is hortatory reliance is placed on Kullukabhatta's remarks on Manu's text relating to the selection of a bride, (II, 6-11) that violation of none of these rules affects the legality of the union. But in his commentary on verse 5 his remark was that the girl must be supported as a mother. As a guide to the interpretation whether the text relating to marriage is directory or not, the rules as to desertion of the girl and the observance of penance for entering into the prohibited alliance would indicate that the marriage is invalid; and if they are absent, then in such cases the marriage is valid and the texts relating to them are directory only. Similarly, the prohibition not to marry a second wife except in certain cases has also been held to be directory only in *Viraswami Chetty* v. *Appaswami Chetty*[3]. So far as the judicial decisions are concerned, no rules of interpretation have been laid down save the dictates of common sense by which a text is to be construed as directory or otherwise on the supposed principle of mixture of religion, law and morality. In the case of the text relating to the adoption of an only son, the rule of the Mimamsa contained in the Hetuman-Nigadadhikarana was suggested as furnishing a safe guide. But the Judicial Committee has not pronounced upon the application of this rule except saying that it may be fairly argued. (*Gurulingaswami* v. *Ramalakshmamma*[4].)

The doctrine of *factum valet* which is a doctrine of the Roman Civil Code has been applied to Hindu law, especially in the law of adoption and marriage. It is said to have its foundation in the Hindu commentaries especially in the Dayabhaga. The well-known sentence वचनशतेनापि वस्तुनः अन्यथाकरणाशक्तेः ||

1. (1897) 7 M.L.J. 134: I.L.R. 20 Mad. 283.
2. (1920) 39 M.L.J. 183: I.L.R. 43 Mad. 830.
3. (1863) 1 M.H.C.R. 375.
4. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113: I.L.R. 22 Mad. 398 at 425 (P.C.).

"a thing or the nature of a thing cannot be altered by a hundred texts", which occurs in the portion of the Dayabhaga relating to the question of the power of alienation of immovable property by a father with the consent of his sons is referred to by Hindu law writers and by decided cases as the Hindu law counterpart of the doctrine. The sentence referred to is well-known throughout Sanskrit religious and philosophical literature and its meaning as understood by Sanskritists is that what exists in the world and is proved to exist by perception cannot be altered by a hundred texts. The familiar illustration given is that any number of texts cannot hold that fire is not hot or that a pot is really a cloth. From this the purport of the sentence is clear. It is difficult to see the connection between this and the doctrine of *factum valet*. The relevancy of the reference to this Sanskrit maxim by Jimutavahana is readily seen. The power of the father over the immovables is a well-known fact of experience and any number of texts cannot do away with the power which he possesses, for in a family, by the very nature of his being the father, he is powerful and can deal with the property as he wishes, even contrary to the wishes of his sons. No legal maxim is intended to be connoted by it. Of course, the Hindu commentaries hold in some instances that a particular prohibition is directory only and appeals only to the moral conscience of a person. When a text is directory can only be decided from the context and from the nature of the prohibition. This will be clear on a perusal of Ss. 28, 29 and 30 of Colebrooke's Dayabhaga, Ch. II. There in discussing the question whether the father of an undivided family under the Dayabhaga has got the power to make a sale, gift or other transfer of immovable property without the consent of his sons, Jimutavahana considers the effect of a text of Vyasa prohibiting the alienation by a coparcener without the consent of the other coparceners. He says that by the text a moral offence only is intended. Then he proceeds to consider the effect of another text prohibiting the gift or sale of immovable property acquired by a man himself without convening all the sons, and says that though the sale or gift may infringe this precept, it is not void. The reason he gives is the sentence referred to above, *viz.*, a thing or the nature of a thing, cannot be altered by a hundred texts. Raghunandana, commenting on this sentence, refers to the illustration of the precept 'slay

not a Brahmin' and says 'if a Brahmin be slain' the precept, 'slay not a Brahmin' does not annul the murder nor does it render the killing of a Brahmin impossible. What then? It declares the sin. This illustration given by Raghunandana will show how far removed is this phrase from the doctrine of *factum valet.* What Jimutavahana really means is that as the absolute power of the father over the self-acquired property or the ancestral property is established in law, the texts prohibiting alienations by him without the consent of his sons or other coparceners have no legal force and cannot affect the power. As a corollary, instead of saying that the texts prohibiting alienations are absolutely unmeaning, it may be said that they impart a moral offence or sin. But the doctrine of *factum valet* which literally means 'a thing which is not valid, if done, becomes valid' connotes that even though an act or transaction may violate rules or formalities established by law which do not go to the root of the matter, or render the transaction absolutely null, when completed is valid in law and must be recognised by courts. It does not mean that a thing which is not legally valid, if done becomes legally valid. As the Privy Council observed in *Gurulingaswami* v. *Ramalakshmamma*[1]:

"That unhappily expressed maxim causes trouble in Indian Courts. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in law stands good in law,"

That is why in *Budansa Rowther* v. *Fatma Bi*[2] the Madras High Court held that the doctrine of *factum valet* cannot apply to the adoption of an orphan which is invalid under the Hindu law. But in *Venkatacharyulu* v. *Rangacharyulu*[3] where a girl was given in marriage by her mother without the consent of the father the doctrine of *factum valet* applied, as the giving by the mother without the consent of the father does not get to the root of the transaction and marriage once performed according to religious ceremonies should not be set aside except on clear proof of fraud.

Lastly, the principle that a decision if accepted for a long number of years by the public as the basis of their transaction

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1. (1899) 9 M.L.J. 67: L.R. 26 I.A. 113 at 144: I.L.R. 22 M. 398 (P.C.).
2. (1913) 26 M.L.J. 260.
3. (1890) 1 M.L.J. 85: I.L.R. 14 M. 316.

should not be disturbed even if it is an error according to the right interpretation of the texts has sometimes been followed by the Judicial Committee (vide *Bhagwan Singh* v. *Bhagwan Singh*[1] and *Jagdish Bahadur* v. *Sheo Partab Singh*[2]). In the first case it was pointed out that, according to the texts, the adoption of the mother's sister's son can be argued to be valid. But the Judicial Committee said that as it had been held for the last 80 or 90 years to be invalid, it will not disturb the original construction. In *Jagdish Bahadur* v. *Sheo Partab Singh*[2] it was pointed out that certain words were added not by the commentator Kullukabhatta but by another inferior commentator, Prakash and Sir William Jones was wrong in thinking it was by Kulluka. But their Lordships said:

"Sir William Jones' version was probably founded on the tradition of the time at which he wrote, and has been accepted in the Indian Courts without question. *Communis error facit jus* is a sound maxim."

This has been criticised by Sircar Sastri in his Hindu law as inapplicable to India where the highest court is not sufficiently acquainted with the language of the texts and the usages of the people.

SUMMARY OF ENGLISH CASES.

NEWCASTLE-UPON-TYNE CORPORATION AND GATESHEAD CORPORATION *v.* RAILWAY ASSESSMENT AUTHORITY AND L. & N. E. RY. CO., (1937) A. C. 275.

Rating—Railway—Bridge for railway and road for passengers—Upper deck for railway—Lower deck for passengers, vehicles, etc.—Tolls treated as general revenue of the Railway Company—Railways (Valuation for Rating) Act, 1930, S. 1, sub-S. (3)—If lower deck a 'railway hereditament'.

In pursuance of S. 23 of the Newcastle-upon-Tyne and Berwick Railway Act, 1845, which required the company "to construct and maintain a bridge across the river Tyne" and so to construct the said bridge as to make it "available not only for the purpose of carrying the said railway across the river but also for providing a roadway for the passage of passengers", etc., across the said bridge, the bridge in question was constructed by the predecessor of the Railway Company. The bridge consisted of an upper deck for the railway and a lower deck carrying a roadway with a toll house at

1. (1898) L.R. 26 I.A. 153: I.L.R. 21 A. 412 (P.C.).
2. (1901) 11 M.L.J. 178: L.R. 28 I.A. 100: I.L.R. 23 A. 369 (P.C.).

each end of the lower deck to enable the Railway Company to collect tolls from passengers using the lower deck. The tolls so taken went to increase the general revenue of the whole undertaking of the Railway Company. The question arose whether the bridge was a 'railway hereditament' within the meaning of S. 1, sub-S. (3) of the Railways (Valuation for Rating) Act, 1930, and as such rateable only by the Railway Assessment Authority and not as a road-bridge by the corporations under the general law. S. 1, sub-S. (3) defines Railway hereditament as "any hereditament occupied for the purposes of the undertaking of a Railway Company" and "undertaking . . . . . includes . . . . . (*b*) any subsidiary or ancillary undertaking carried on by the company, not being a road transport, sea transport, or air transport undertaking".

Held, that the lower deck was part of the principal undertaking of the company and is a hereditament occupied for the purpose of that undertaking. Even otherwise the roadway undertaking is at least an undertaking "subsidiary or ancillary" to the "principal" or railway undertaking of the respondent company. As such it was a "railway hereditament".

RICHARDS *v.* GOSKAR, (1937) A.C. 304.

Workmen's Compensation Act, 1925, Ss. 1, 43, sub-S. (1)—Workmen suffering from miner's nystagmus—Certificate of disablement—Compensation paid—Workmen joining duty again—Not recovered—Unable to continue—Claim for compensation—If a fresh certificate of disablement necessary.

A workman who has been certified as suffering from miner's nystagmus and thereby to have been disabled, and receives compensation for some time but returns to his former work at his former wages although he has not in fact recovered from the disease, and is still found to be suffering from the same disease, and to be disabled by that disease, is not debarred from recovering compensation on foot of the original certificate. Where therefore a miner suffered in 1932 from nystagmus, and being duly certified received compensation for a time, then joined employment again but finding himself after a time unable to continue left it and applied for compensation but without any further valid medical certificate, and it is found that he was not recovered from the disease, he can rely on the original certificate which he has obtained and it is not necessary that he should obtain a second certificate of disablement before he can receive compensation for the second disablement.

ALDERMAN *v.* GREAT WESTERN RAILWAY COMPANY, (1937) A.C. 454.

Workmen's Compensation Act, 1925, S. 1—Travelling ticket collector—Headquarters at O—Duty to travel from O to S—Stay

overnights at S—Lodgings at S at the workmen's choice—Duty to notify address to employers and to be ready to work if called on for emergencies—Ticket collector leaving his lodgings in the routine course to resume his employment—Accident on the way—If in the course of the employment.

A travelling ticket collector of the G. W. Ry. Co. was residing at Oxford. His duty required him to travel from Oxford to Swansea, where he had to stay overnight, and next morning to return to Oxford. His obligations under the contract of service required him to leave his address with his employers so that they may know where to find him in case he was required for emergency duty as a guard, for which also he was qualified, and to live in a reasonable proximity to the station. He had an unfettered choice at the end of the day's work as ticket collector to spend the night as he pleased and to return to duty the next morning, subject only to this obligation to attend duty if called on for any emergency and he was at liberty to choose what route he pleased to come to the station. One morning he started from his lodgings to go to the Swansea station to take up his duties but slipped and fell in the highway and sustained the injuries in respect of which he claimed compensation.

Held, that the accident did not arise in the course of the employment. The words in the course of the employment do not mean during the currency of the time of the engagement, but in the course of the work which a man is employed to do and what is incident to it. 'In the course of employment' connotes the idea that the workman is doing something which is part of his service to his employer or master. There is no contractual limitation at all of the man's choice of abode either at Swansea or at Oxford. When the workman set out from the house in which he had chosen to lodge in Swansea to go to sign on at the station he was subject to no control and he was for all purposes in the same position as an ordinary member of the public, using the streets in transit to his employer's premises.

London and North-Eastern Ry. Co. v. *Brentnall,* (1933) A.C. 489, distinguished.

KNOWLES *v.* SOUTHERN RAILWAY COMPANY, (1937) A.C. 463.

Workmen's Compensation Act, 1925, S. 1—Accident to workman—Rule prohibiting employees from drinking intoxicating liquor while on duty—Employee driving a van—Employee leaving the van and going to drink—Van tied—Returning after drink and getting into the van—Slipping while attempting to mount on the box seat—Death caused thereby—If accident occurred in the course of employment.

It was a rule of the Southern Railway Company (England) that "employees must not consume intoxicating liquor while on

duty" and it was known to all the employees. A workman *K* was employed as a van driver by the said Southern Railway Company. He was sent on duty from the Railway Company's Tooley Street depot to take a load to their depot at Nine Elms. While on his way from Tooley Street to Nine Elms, *K* stopped his van outside a public house, descended from the box seat having first drawn into the near side kerb, put a chain on the near side hind wheel, removed the near side trace, threw it over the back of the near side house, and put the reins through a brass ring on the harness. Then leaving the van in charge of the boy, he went some distance up a side street to a public house to get a glass of beer and also to use the lavatory. It was found that the dominant purpose was to drink beer. He took beer and went back straight to the van to resume his duty. He removed the chain from the wheel, replaced the trace, took the reins in his hands and was in the act of mounting to the box seat, when, by the horses suddenly moving, he slipped and fell under the wheel and sustained injuries and died. His widow claimed compensation.

Held, that the accident did not arise in the course of the deceased's employment. From the moment that the workman left the driver's seat as the first step towards the public house, he broke off his employment; and none of the acts which he did, such as chaining up the near hind wheel, or unfastening the near trace or putting the reins through the harness ring, were acts done in the course of his employment. Where a man leaves his work in order to break a rule; he necessarily takes himself out of the scope or sphere of his employment, and remains outside its limits until the time he resumes his employment. When he returned to the van he had perforce to do several things before he could resume the work which he was employed to do. He had to unchain a wheel, refasten a trace, take possession of the reins, and regain effective control of his horses in order to start them again on their interrupted journey. The accident happened before the workman had completed the series of acts which, owing to his breach of duty, had to be performed before he could begin to regain effective control of his horses for the purpose of re-starting them on the interrupted journey and therefore the accident did not happen in the course of employment.

EVANS *v.* BARTLAM, (1937) A.C. 473.

Practice and procedure—Decree ex parte—*Application for stay of execution—Stay granted—Later application to set aside the* ex parte *decree—If maintainable—Powers of appellate Court.*

The plaintiff obtained an *ex parte* decree for payment of money against the defendant. The plaintiff's solicitor applied for execution when the defendant appeared and prayed for time to raise the money. Time was granted. Later on, he applied to have the decree

set aside and for leave to defend. The Master refused the application but on appeal the Judge set aside the judgment on terms as to costs. On appeal therefrom, the Court of Appeal reversed the judgment holding that the Judge was precluded from exercising his discretion to set aside the judgment by the fact that with knowledge of the judgment the defendant had applied for the matter to stand over for him to see if he could arrange to pay, thereby electing to abide by the judgment and by the plaintiff having consented to the time being granted, the plaintiff gained a benefit, namely, time, which he cannot reprobate.

Held (reversing the Court of Appeal), that where a judgment-debtor asks for and obtains stay of execution, he does not approbate the judgment so as to preclude him thereafter from seeking to set it aside whether by appeal or otherwise.

While the appellate Court will not normally interfere with the exercise of the Judge's discretion on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done, it has both the power and the duty to remedy it. Appellate jurisdiction is always statutory and there is in the statute (Rules of Supreme Court) no restriction upon the jurisdiction of the Court of Appeal.

KIRK *v.* EUSTACE, (1937) A.C. 491.

Husband and wife—Deed of separation—Covenant to pay a weekly sum to wife during her life—Death of husband—If estate liable to pay—Absence of provision binding the estate—Law of Property Act, 1925, S. 80.

By a deed dated 23rd September, 1922, made between the husband T.L.K. and his wife A.M.K., they had mutually agreed to live apart and the husband had agreed to pay his wife "a clear weekly sum of two pounds during her life for the maintenance and support of herself" so long as she "shall continue to lead a chaste life". There was a further provision that in case they "shall at any time hereafter cohabit as man and wife then and in such case the said weekly sum of two pounds shall no longer be payable and all the covenants hereinbefore contained shall become void". In 1936 the husband died and the executors refused to pay the sum contending that the deed was effective only during his lifetime.

Held, that on the plain construction of the agreement, the husband's estate remained liable to pay this sum which he had covenanted to pay to the wife during her life. Though the covenant is not expressly made by the covenantor for his executors and administrators, the deed must be read as so made, by virtue of S. 80 of the Law of Property Act, 1925, which has only reproduced the old law contained in the Conveyancing Act, 1881.

ANDREWS v. DIRECTOR OF PUBLIC PROSECUTIONS, (1937) A.C. 576.

Criminal law—Manslaughter—Reckless driving of motor car —Elements to be considered—Road Traffic Act, 1930, S. 11 and Road Traffic Act, 1934, S. 34.

The accused was employed by L. Corporation Transport Department. On the day of the accident he was directed to take a van to assist a corporation omnibus which had broken down about four miles away. One *B was* driving a saloon car down the road at about 10 miles an hour and he noticed about 30 yards ahead, the deceased *C* crossing the road from *B's* nearside. The road was 29 feet wide. The accused driving fast over 30 miles an hour and driving well over on the offside of the road ran into *C* who was then within 3 or 4 paces of the kerb. He was carried on the bonnet for a short period, thrown forward and run over by the van. On a charge of manslaughter the Judge summed up as follows:—"If a man is doing an unlawful act—if he is doing something which the law says that he must not do, and because he is doing it, he kills somebody, then he is guilty not only of that unlawful act, but of manslaughter. He has killed somebody in the course of doing and because he was doing, an unawful thing. If he is driving (a motor car) recklessly he commits an offence whether he kills anybody or whether he does not, but if because he is driving recklessly somebody is killed, then he is guilty of the offence of manslaughter. I think I ought to tell you this, that if you thought that although he drove recklessly and although he drove at a speed or in a manner dangerous to the public within the words of (S. 11 of the Road Traffic Act, 1930) but that it was not because of that that this man was killed, the law would entitle you to convict him not of manslaughter but of dangerous driving. But in this case I am bound to tell you that if you think that he was driving recklessly and in a dangerous manner within the meaning of these words, and it was because of that Mr. C. was killed, then it is your bounden duty to convict him of manslaughter."

Held, that though there may be something open to criticism in the earlier portion of the charge, on a consideration of the summing up as a whole, the true question was ultimately put to the jury and on the evidence the verdict of guilty was inevitable. In directing the jury in a case of manslaughter by rash driving, the judge should in the first instance charge them substantially in accordance with the general law, that is, requiring the high degree of negligence indicated in Bateman's case, namely, that the facts must be such "that in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment. Then

the judge should explain that such degree of negligence is not necessarily the same as that which is required for the offence of dangerous driving and then indicate to them the conditions under which they might acquit of manslaughter and convict of dangerous driving. A direction that all they had to consider was whether death was caused by dangerous driving within S. 11 of the Road Traffic Act, 1930, and no more would be a misdirection.

N.B.—Ss. 11 and 21 of the Road Traffic Act, 1930, are as follows:—

Road Traffic Act, S. 11, sub-S. (1): "If any person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be liable (to fine or imprisonment)."

"Section 21 makes provision for the giving of notice to persons whom it is intended to prosecute under (*inter alia*) S. 11."

Section 34 of the Road Traffic Act, 1934, is as follows:—

"Upon the trial of a person who is indicted for manslaughter in connection with the driving of a motor vehicle by him, it shall be lawful for the jury, if they are satisfied that he is guilty of an offence under section 11 of the principal Act (which relates to reckless or dangerous driving) to find him guilty of that offence, whether or not the requirements of section 21 of the principal Act (which relates to notice of prosecutions) have been satisfied as respects that offence."

In re A Debtor, (1937) 1 Ch. 181.

Insolvency—Moneylenders Act, 1927, S. 9, sub-S. (1)—Petition by moneylender to adjudicate debtor—Claim for principal and 5 per cent. interest—Balance interest reserved as claimable under S. 9, sub-S. (1)—Tender by debtor of principal and 5 per cent. interest alone—If creditor bound to accept—Jurisdiction to make receiving order.

At the time of the bankruptcy petition, there was due by the debtor certain sums at more than 5 per cent. interest. The moneylender filed a petition to adjudicate the debtor an insolvent setting out the amounts due under certain promissory notes with 5 per cent. interest and then it (petition) added "and we have also a claim for interest on the said two promissory notes which is postponed interest under S. 9, sub-S. (1) of the Moneylenders Act, 1927," for a certain sum. At the hearing, the debtor tendered all the moneys due with 5 per cent. interest only but the moneylenders refused to accept it. The debtor contended that he had tendered what was due and as that was not accepted the petition must be dismissed. S. 9, sub-S. (1) of the Moneylenders Act, 1927, provides that "where a debt due to a moneylender in respect of a loan made by him shall, for the purposes of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition . . . . be calculated at a rate not exceeding 5 per cent. per annum, but nothing in the

foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled".

Held, that in computing the fifty pounds required for presentation of a bankruptcy petition by S. 4 of the Bankruptcy Act, 1914, S. 9, sub-S. (1) would have the effect that the figure should be arrived at only by utilising by way of interest not more than 5 per cent., but that does not make the debt any the less a debt due. The sum of interest beyond the 5 per cent. was in law owing by the debtor to the moneylenders and in the event of debts proved in the estate being paid in full the moneylender would be entitled in the bankruptcy proceedings to that sum. The mere fact that they could not include it in the quantum which would enable them to bring in a petition does not prevent it being said that it was part of the debt owing to them recoverable in bankruptcy proceedings. The petition cannot therefore be dismissed.

In re: KEEN. EVERSHED *v.* GRIFFITHS, (1937) 1 Ch. 236.

Will—Secret trust—Clause to pay such person 'as may be notified by me' to the executors or either of them—Notification to one trustee prior to will—If evidence of such trusts admissible—If such a notification valid—Wills Act, 1837.

A testator by his will, dated 11th August, 1932, appointed *K, H,* and *E* to be executors and trustees of the will and by cl. (5) stated "I give to the said *H* and *E* the sum of 10,000*l.* free of duty to be held upon trust and disposed of by them among such person or persons . . . . . as may be notified by me to them or either of them during my lifetime and in default of such notification and so far as such notification shall not extend I declare that the sum of 10,000*l.* or such part thereof as shall not be disposed of in manner aforesaid shall fall into and form part of my residuary estate". It was in evidence that he had told Mr. *E* in 1928 when he wrote a will containing an identical clause that he (testator) wished to give a legacy to a person whose name he wished to keep secret and in March, 1932, when a new will was written he brought a sealed envelope addressed to *H* and *E* and handed it over to Mr. *E* with instructions to keep it with his will and open it after his death. The envelope contained a memorandum signed by the testator, containing the beneficiary's name with the words "in accordance with the directions in my will". In August, when the last will in question was executed, cl. (5) was left intact and this cover remained with Mr. *E*. Mr. *H* was not notified of this will after the testator's death.

Farwell, J., held that the clause required the name and identity of the beneficiary to be expressly disclosed to the trustees dur-

ing the testator's lifetime and as that was not done it was not enough.

Held, by the Court of Appeal (affirming Farwell, J., on other grounds) that giving of the envelope would be sufficient notification. But cl. (5) should be considered as contemplating future dispositions and as reserving to the testator the power of making such dispositions without a duly attested codicil, simply by notifying them during his lifetime but that is invalid as contrary to Wills Act, 1837, as pointed out by Lord Sumner in (1929) A. C. 339. Further the trusts which it is sought to establish by parol evidence would be inconsistent with the express terms of the will. If cl. (5) had been worded as applying to trusts previously indicated by the testator, the sealed letter would have been admissible, subject to proof of communication and acceptance of the trust.

Blackwell v. *Blackwell*, (1929) A. C. 318, distinguished.

CAHILL *v.* LONDON CO-OPERATIVE SOCIETY, LIMITED, (1937) 1 Ch. 265.

Industrial and Provident Societies Act, 1893, S. 10, sub-S. (6)—Industrial and Prudential Society—Co-operative Society registered under the Act—Rule allowing allocation of a percentage of net profits for political activities.

A society was registered in 1920 under the Industrial and Prudential Societies Act, 1893, with a membership of 530,610 persons and a share capital of 6,790,509*l.* odd. One of the rules provided that "5 per cent. of the net profits shall be allocated to an education and a Political Fund". The society since its registration allocated out of the net profits earned to an education and a political fund of the society and had applied half of that to political activities. The question was if such application was proper and *intra vires.*

Held, that sub-S. (6) of S. 10 of the Industrial and Provident Act, 1893, provides that "the rules of every society registered under this Act shall provide for the profits being appropriated to any purposes stated therein or determined in such manner as the rules direct". The words "any purpose" are very wide and therefore it cannot be limited as to any purposes connected with the society's objects. The allocation was therefore *intra vires.*

Decision of Lord Ormidale in *Lafferty* v. *Barrhead Co-operative Society, Ltd.,* (1919) 1 Sc. L. T. 257, applied.

ADAMSON *v.* BIRKENHEAD CORPORATION, (1937) 1 Ch. 279.

Costs—Practice—'Defendants to have the costs except costs attributable to an issue'—Effect of—If plaintiff entitled to appor-

tionment—Repeal of R. 5 of O. 65 of Rules of Supreme Court—Effect of.

In dismissing an action, the Judge directed the defendants to have the costs of the action (to be taxed as between solicitor and client) except the costs attributable to a particular issue, the costs on that issue to be the plaintiff's and to be taxed as between party and party.

Held, that the repeal of R. 2 of O. 65 of the Rules of Supreme Court has made no difference in this respect and an order of this kind is to be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, and the plaintiff cannot claim to have the general costs of the action apportioned, as was the case before 1902.

In re: MORTIMERS (LONDON), LIMITED, (1937) 1 Ch. 289.

Company—Voluntary liquidation by members—Appointment of liquidator and fixing of remuneration—Later compulsory order to wind up by Court—If voluntary liquidator's remuneration can be reviewed by Court—Companies Act, 1925, S. 175 and Companies Act (Winding-up) Rules 1929, r. 192—Effect of.

At an extraordinary general meeting it was resolved that the company should be wound up voluntarily and at a later meeting pursuant to S. 232 of the Companies Act, 1929, the remuneration of the voluntary liquidator was fixed by the members at 550*l.* About a month after, the company was ordered to be compulsorily wound up on a petition of a creditor. The voluntary liquidator claimed that his remuneration must be deemed to have been validly fixed under the provisions of S. 175 and that he was entitled to the whole of it.

Held, that on compulsory liquidation, the distribution of assets on such a winding up is fixed by r. 192 of the Companies (Winding-up) Rules of 1929 and under it the Court, in any case where a voluntary liquidation has been superseded by a compulsory order, has power to review any remuneration that has been fixed to the liquidator either by the members or by the creditors.

LEWIS *v.* PLUNKET, (1937) 1 Ch. 306.

Mortgage—Title deeds of property in possession of mortgagee—Mortgage barred—Mortgagor in possession of the properties—Mortgagor if can claim possession of title deeds.

By a mortgage dated 18—3—1921 the plaintiff mortgaged to the defendants certain hereditaments for securing a loan of 1,600*l.* with interest at 6 per cent. per annum. The mortgage deed and other title deeds were handed over to the defendant. In

November, 1921, the plaintiff duly paid to the defendant interest due under the mortgage. That was the only payment of interest and no further payments were made and no acknowledgment of the debt. In 1936 the mortgagor filed the suit for delivery to her of the mortgage deed and all other title deeds in the possession or control of the defendant.

Held, that the plaintiff was entitled to succeed. *Prima facie* the legal estate is in the person who is in possession of the property, that is, the plaintiff. The effect of the Statutes of Limitations is not to convey any estate or interest from the person in whom it was originally to the trespasser or other person who acquires a title by virtue of the Acts, but on the other hand the estate, whether it be legal or equitable or both, of the original mortgagee or the original owner, is put an end to once and for all by these statutes. That person no longer has any title in law or in equity, his rights having ceased. The plaintiff having an indefeasible title is entitled to get back the title deeds to which she is entitled.

IRON TRADES EMPLOYERS INSURANCE ASSOCIATION, LTD. *v.* UNION LAND AND HOUSE INVESTORS, LTD., (1936) 1 Ch. 313.

Mortgage—Mortgage-deed—Mortgagor covenanting not to exercise his power of leasing given by the Law of Property Act, 1925, without mortgagee's consent—Lease granted without such consent—If amounts to a breach of the covenant not to lease.

By a legal charge, dated 1st October, 1935, the defendants (borrowers) charged the lands comprised in the charge and certain other freehold premises to the plaintiffs (mortgagees) and under it the defendants agreed not to exercise the power of leasing conferred on them as mortgagors in possession under the Law of Property Act, 1925, without the previous written consent of the plaintiffs. But shortly afterwards the defendants demised a part of the premises on a yearly tenancy without the consent of the mortgagees. When the mortgagees came to know of it, they brought an action for a declaration that such a lease constituted a breach of the agreement.

Held, that the Act did not take away the power of a mortgagor in possession to lease as it stood before the Act. Before the Property Act of 1925 and the Conveyancing Act, 1881, the position was that in the case of a legal mortgage, the mortgagor although in possession, had no power at all to grant a lease which was binding on the mortgagees. Any lease granted by him to some third party would be in no way binding on the mortgagee and as between the lessee and the mortgagee would create no estate or interest against the mortgagee except that he had a right to redeem in the event of the mortgagee taking steps to evict him from possession. As between the mortgagor and the lessee it was a good lease. The Con-

veyancing Act, 1881, gave some power to the mortgagor to grant a binding lease under certain circumstances. The mortgage deed only dealt with this right and it is this right that the mortgagor agreed not to exercise without mortgagee's consent. There has been therefore no breach of the contract, as the mortgagors were not exercising their statutory power.

In re: T. N. FARRER, LIMITED, (1937) 1 Ch. 352.

Company—Governing Director—Appointment for life or voluntary retirement at a salary—Voluntary winding-up—If Director entitled to damages for loss of office.

A company was incorporated as a private company for the purpose of carrying on shoe trade. One *J* held 2,100 shares out of 2,102 issued. By Article 12 it was provided that *J* should be the governing director of the company for life or until he should resign or be removed by special resolution. His remuneration was fixed at £300 a year. From 1927 to 1933 *J* was the sole director of the company. In 1934 an extraordinary resolution was passed for voluntary winding up of the company and the company was accordingly wound up. Mr. *P* and Mr. *B* were appointed liquidators. *J* assigned all his assets to his creditors and the assignees claimed from the liquidators, along with the moneys advanced by *J* to the company, compensation for loss of office as managing director.

Held, that *J* held office on the terms of the articles. It is from them alone that the terms of his contract can be ascertained. The result of the resolution to wind up in the circumstances was to put an end to the contract. But as the terms of the contract is to be found only in the articles, it is a condition of the continued employment of the director that the company must continue to exist. The employment of the governing director was, therefore, as a matter of contract, limited to the active life of the company. Therefore there has been no breach of the contract and as such no compensation can be claimed as for breach.

The question whether where apart altogether from the articles, the company and the director have entered into an independent agreement, and the period of service is for a fixed term or for the life of the director, and the company goes into liquidation, the company can claim compensation for loss of service left open.

JOTTINGS AND CUTTINGS.

Life Peerages.—There has been an interesting correspondence in the *Times* on Life Peerages, and there was a debate on the subject in the House of Lords on March 24, on a motion by Lord Strickland. The debate, in which fortunately the Lord Chancellor was able to take part, led nowhere, though Life Peerages and a

restriction of the hereditary element offer the simplest way of reforming the constitution of the House, which, though long delayed, is, it is safe to say, bound to come. It seems axiomatic that it had better come on the initiative of the House of Lords itself than be forced on it from without. The correspondence began in the *Times* of March 12 with a letter from Sir John Marriott questioning the finality of the decision of the Committee of Privileges in 1856 in the *Wensleydale* case, when it was proposed to confer a life peerage on Baron Parke. It included a letter (March 15) from Mr. Edward F. Iwi, pointing out that, on the authorities, a resolution of the Committee is not a final judgment, and referring to the *Rhondda case,* (1922) 2 A.C. 376, in which Lord Birkenhead induced the Committee to reverse its previous decision that a peeress in her own right could, since the Sex (Disqualification Removal) Act, 1919, receive a summons to Parliament. This left the sufficiently absurd result that a peeress cannot sit in the House of Lords, but the wife of a peer can sit in the House of Commons. That, of course, does not touch life peerages, but it shows that a decision of the Committee of Privileges is not final. In a letter (*Times,* March 30) summing up the correspondence, Sir John Marriott suggests that the Crown (of course, on advice) should to-day ignore the Wensleydale decision. The appointment of life peers, if made, would no doubt produce an interesting situation. Very possibly it would be generally acquiesced in as an excellent innovation. Then would arise the question of restricting the hereditary element.—*L.J., 1937, p. 227.*

The Speed Limit: A Novel Point.—Section 3 of the Road Traffic Act, 1934, exempts a motor-vehicle from the speed limit when used for "fire-brigade, ambulance or police purposes" if observance of the limit "would be likely to hinder the user of the vehicle for the purpose for which it is being used on that occasion". Can a private person, seeing a motor-vehicle which he believes to be exceeding the speed limit, pursue it with a view to obtaining by his own speedometer evidence of an offence, and then justify his own excessive speed on the ground that he was acting for "police purposes"? This pertinent question does not appear to have been the subject of judicial determination in England, but the High Court of Justiciary of Scotland recently answered the question in the negative in *Strathern* v. *Gladstone,* (1937) Sc.L.T. 62. This was a case stated by the Sheriff Substitute of Lanarkshire, who found as fact that the defendant had seen a police car which he believed was being driven at an excessive speed. The defendant accordingly pursued it in order to obtain evidence of a breach of the law, but was himself stopped and charged with exceeding the speed limit. The Sheriff Substitute further found that the police car was exceeding the speed limit without justification, but that

the defendant was justified if in the opinion of the High Court he was using his car for "police purposes". The Court held that he could not crave in aid this statutory exemption, in that the general public duty of preventing breaches of the law did not justify in the case of so trivial an offence the offender himself breaking the law; and that the words "police purposes" was not an apt expression to describe this general public duty. Whilst not of binding authority, we imagine that this decision is one whose reasoning would commend itself to the Courts of this country if and when they are called upon to determine this question.—*L.J., 1937, p. 228.*

Libel or No Libel.—The Court of Appeal again could not agree recently as to an interesting libel action which came up from Assizes (*Byrne.* v. *Dean,* 1936, 3 All. E. R. 204). The Judge on Circuit thought that a few lines of doggerel verse put up on a club notice-board were capable of bearing a defamatory meaning, and awarded a small sum in damages. The innuendo alleged was that those who read the doggerel would think badly of the plaintiff, because they would infer that he had told the police that some sort of unlawful gaming was going on in the club. Most of our readers will agree with the learned Judge below, and with the dissenting Lord Justice of Appeal (Greer, L.J.), that it is socially defamatory to say of a member of a club anything which implies that he is disloyal to his fellow clubmen. The two other Lords Justices, however, took the stricter view—that it cannot be defamatory to say of a person that he has assisted the police or other lawful authority to carry out the law or detect cases of infringement. There is, of course, a host of authority to say that the Judge alone must decide whether or not words are capable of bearing a defamatory meaning. But even after the most industrious perusal of *Capital and Counties Bank* v. *Henty* (7 A.C. 741), we have to reconcile ourselves to the truth that the vital question is one of opinion, not of law. Opinions, even of the best Judges, may differ. They have now done so.—*L.J., 1937, p. 229.*

Judicial Notice of Scott's Novels.—Readers of the Antiquary may remember that Monkbarns explains to his nephew that in Scotland no man can be legally imprisoned for debt. "You suppose," he said, "that a man's committed to prison because he cannot pay his debts. Quite otherwise; the truth is, the King is so good as to interfere at the request of the creditor and to send the debtor his royal command to do him justice within a certain time —fifteen days or six, as the case may be. Well, the man resists and disobeys; what follows; Why, that he be lawfully and rightfully declared a rebel to our gracious sovereign, whose command he has disobeyed, and that by three blasts of a horn at the market place of Edinburgh, the metropolis of Scotland. And he is then lawfully imprisoned, not on account of any civil debt, but because

of his ungrateful contempt of the royal mandate". In the case of *Thom* v. *Black* (7 Shaw 158), which came before the Court of Session when Scott was acting as Clerk, Lord Gillies enlarged on the different modes of securing or attaching property such as arrestment, inhibition, poinding, and adjudication; "but, in regard to the person," he went on to say, "the principle is that it cannot be laid hold of for debt. Before this can be done the debtor must be declared a rebel, and it is only as a rebel that he can be imprisoned. The law of the subject cannot be better expressed than it is by Monkbarns in a work of fiction with which we are all well acquainted". On can imagine Scott's embarrassment as well as enjoyment on hearing this judicial approval of the law which he had laid down. This, by the way, was not the only occasion when Scott's work received judicial notice. Lord Hermand is said to have been so carried away by enthusiasm for Guy Mannering that his brother Judges failed to restrain him from plucking the book from his pocket and reading a passage in illustration of his Judgment.—*L.T., 1937, p. 264.*

School Attendance.—An interesting case on school attendance came before a Bench in Wales this week. A number of parents were summoned by the Glamorganshire Education Committee for failing to send their children to school. Their defence was that the children could not get from their homes to the school without taking one or other of two dangerous ways. The magistrates, after a view, upheld the defence. The Education Act of 1921 allows cestain defences to proceedings of this kind which the magistrates are bound to accept. One is, of course, sickness; another, that there is no public elementary school within such distance as the by-laws may prescribe, but this may never exceed three miles; another, that the child is being efficiently taught elsewhere. As to this last the Court has some discretion. The decision of the Divisional Court in *London County Council* v. *Maher* (93 J.P. 178) shows, however, that these statutory defences are not the only pleas which are open to parents who are summoned in this way. Some other excuse may be put forward, and it then becomes a matter for the Justices to determine in their discretion whether it is reasonable. Most people will agree that young children should never be asked to put themselves in peril when going to school; and it is satisfactory that the law enables the magistrates to say so.—*L.J., 1937, p. 246.*

Pitt Taylor.—Mr. Mathew's narrative of the extinction of the Palace Court includes the interesting additional fact that Pitt Taylor, the author of the standard work on Evidence, devilled the brief for the counsel instructed on behalf of Higgins, and, according to the latter, made so poor a fight that the defence was hopeless. Whatever may have been the ineffectiveness of the fight put

up, it appears to have been due to a badly drawn brief, with many of the material facts omitted. Infuriated in his turn by the aspersion upon his alleged failure to do justice to the cause of the client for whom he appeared, Pitt Taylor also wrote a long letter to *The Times*, but couched as it was, according to Mr. Mathew, in such indignant and vituperative terms, the authorities of Printing House-square published only an expurgated version of the missive. Pitt Taylor was not the man to take things lying down, and he certainly showed cause against the contention of Higgins that he had been badly let down.—*L.T., 1937, p. 283.*

Pitt Taylor's Law of Evidence.—Now, the fair fame of John Pitt Taylor rests not upon his connection professionally with the famous cause in the Palace Court which contributed to its extinction, but to the fact that to him we owe the first work—not, of course, in point of time, but of importance and value—exhaustive and well written, on the Law of Evidence, but, as someone has said, a reputation as a legal writer can hardly be established even when executed so admirably as was that of Pitt Taylor's. Even his connection with the Pitt family, whence he got his second name, did not, in the opinion of the editors of the Dictionary of National Biography, entitle him to a place in its pages. It would appear that he was early attracted to the subject of evidence, for in 1842 he reviewed the third edition of Starkie's book on the subject in which he started off with the cheerful dictum that "of the first three editions of a law treatise the third is usually the worst," and he then subjected the work under review to a severe cross-examination, and, finding it wanting in many respects, did not hesitate to say so in very plain terms. Remembering this when he came to produce his own elaborate work, he sought, and successfully sought, to make even the third edition better than its predecessors. Unlike many writers of legal treatises, he did not disdain to enliven the text with some apposite quotation from lighter literature; thus he set out the classic passage from Pickwick, where Sam Weller is solemnly informed by Mr. Justice Stareleigh that "you must not tell us what the soldier or any other man said; it's not evidence"; and not only did Pitt Taylor do this, he actually included in the Table of Cases prefixed to the volume the entry, "*Bardell* v. *Pickwick*," which a later editor excised as being apparently too frivolous. In the fifth edition it is interesting to recall that the future Lord Justice Romer—the father of the present Lord Justice—lent assistance in the preparation of the index, and, as he did when performing a similar task for one of the editions of Smith's Leading Cases, he enriched it with not a few humorous entries which rejoiced the hearts of those who love their more solid professional literature to be lit up now and again by a little humour.—*L.T., 1937, p. 283.*

Controversy with Chief Justice Cockburn.—Pitt Taylor was ever ready for a fray, whether it was to defend himself against the charge of ineffective devilling in the Palace Court, or in maintaining his opinion on a question of the law of evidence, which he had made his own territory. In the eighth edition of his work he made a brief reference to *Reg.* v. *Bedingfield,* (14 Cox. C. C. 341) which gave rise to a pamphlet warfare between him and Chief Justice Cockburn on the propriety of the latter's ruling in the case just mentioned. By this time Pitt Taylor was on the county Court bench, and he was solemnly admonished by the Chief Justice that it was contrary to judicial etiquette to enter into a newspaper controversy. To this Pitt Taylor rejoined that though he held a judicial office, "albeit I am the least of the judges, and am not worthy to be called a judge," the Chief had shown how little the reprimand was merited by sending his letter to *The Times.* Cockburn further exposed himself to a caustic answer to some sneering references to Taylor's work on Evidence. This was an unlucky shot, for as it happened Cockburn, many years previously, in acknowledging a presentation copy of the work, wrote a most eulogistic letter to Pitt Taylor, concluding with the words: "I sincerely congratulate you on having associated your name with a work which will be read and admired while English law remains". Pitt Taylor could not refrain from reproducing this morsel in his pamphlet, and probably Cockburn regretted his sneer or the reference to the great repository of evidential law.—*L.T., 1937, p. 284.*

The New Deals in the West.—The two great divisions of North America, the United States and the Dominion of Canada, form an interesting study in the effect of written constitutions. Each has its "New Deal," which may be defined as an attempt to correct on a vast scale the unfortunate effects of unregulated trade and industry, and each has suffered from the grip of a written Constitution as interpreted by a Court of Law. In the United States it is the Supreme Court. For Canada it is the Judicial Committee of the Privy Council. Between these two tribunals there is the distinction that the Supreme Court, like the House of Lords, allows separate judgments and therefore dissent is possible; though we believe it is the practice for only two judgments to be delivered, one representing the view of the majority, and the other that of the minority. With the nine members a majority of five to four appears not to be uncommon. So a change of view of a single Justice may reverse the Court's mode of interpretation of the Constitution.—*L.J., 1937, p. 261.*

The Supreme Court's Change of View.—This appears to have happened in the series of five decisions of the Supreme Court last Monday, when a majority of five to four established the validity of the Wagner Labour Relations Act, which gives to workmen the

right of collective bargaining. It is natural for people who do not know the judicial mind to trace what looks like a change of attitude to President Roosevelt's scheme for reforming the Court by appointing younger men as additional Justices. But no doubt the change though *post hoc* is not *propter hoc.* And Chief Justice Hughes, who delivered one of last Monday's majority judgments—incidentally he described the right of workers to organise and to bargain collectively as a "fundamental right"—has protested in a letter presented to the Senate Judiciary Committee who are considering the President's scheme, that the result of it would be to impair the efficiency of the Court. It is interesting to note that, in a decision given on March 29, the Court by its customary majority of five to four upheld the right of a State—the State being Washington—to establish a minimum wage for women. This reversed the previous decision given as regards other States, including New York, that such a law was invalid. Thus the Supreme Court in recognising that its own previous decision may have been wrong differs from the House of Lords, which declines to admit error. And yet some decisions of the House of Lords have been found to be by no means beyond criticism.—*L.J., 1937, p. 261.*

Peaceful Blockade.—The blockade of Bilbao may well go down to history as the most warlike of peaceful blockades. As blockade proper it is not admitted; real blockade is only legitimate as an act of war and cannot be created except by recognised belligerents. Nor is this situation affected by any non-intervention treaty, which relative to the fighters is only the municipal law of other nations, and only relevant as a limited recognition by those nations of a principle of contraband. So far as Great Britain is concerned, peaceful blockade is not operative against neutrals, nor has been since Great Britain abandoned its more bloodthirsty practices at the end of the eighteenth century. France, since the blockade of Mexico in the eighteen-fifties, appears to have adopted British practice. But the position has been made almost impossible by the practice of mine-laying. During the War 1914-1918, mine-laying had the effect of translating neutrals into combatants. On the same principle, mine-laying makes a peaceful blockade into a blockade of war. During the last few days, Great Britain has tactfully negotiated the diplomatic dangers of mine-fields, and as yet neither admits nor tests the rights of the mine-layers. But the position is difficult. Either this mine-laying is war by an unrecognised belligerent, or else a new formula must be found. For mines are surely of a nature to be classified with those "realites que les jurisconsultes doivent avoir toujours presentes a l'esprit, s'ils ne veulent point exposer leurs systemes aux perpetuels dementis de l'experience".—*L.J., 1937, p. 261.*

Ex Facto Jus Oritur.—The other point of importance in *Robinson Bros. (Brewers), Ltd.* v. *Houghton and Chester-le-Street, A. C.* is as to the reversal of decisions of long standing. When an erroneous decision has been practically applied for a number of years the Courts may be somewhat averse to altering the law. But the case in question indicates that where a decision is plainly wrong, and practical injustice will arise in the consequences that must flow if the decision is still applied, the duty of the Court is clearly to overrule it. This course was in fact taken here, since the practical injustice that otherwise would have flowed would have been that brewers would be underrated, with the consequence that the burden of rates would be unfairly apportioned among other ratepayers. We may add that the judgments will repay a very careful study and that much useful guidance is to be found therefrom as to the general principles of rating valuation. The Lords Justices all arrived at the same conclusion, though the *ratio decidendi* was different.—*L.J., 1937, p. 263.*

Lawyer and Litterateur.—Among forthcoming publications, one which we are promised almost immediately and which should make a wide appeal, not only to those interested in the world of books, but also to members of the legal profession, is the Autobiography of the late Mr. Augustine Birrell, whose manifold activities—in law, in letters, and in politics—were all lit up by many a wise and witty saying. A bookman, if there ever was one, he possessed the art of making his keen interest in letters generally contagious, and indeed his own admirable style and his comment on life, at once pungent, yet kindly, made him all unwittingly add a new word to the language, namely, "Birrellism," which may be found in the appendix to the latest edition of the Oxford Concise Dictionary. In all his books he never let us forget his legal training and his legal practice; the very titles of several of his volumes —Obiter Dicta, Res Judicatæ, and More Obiter Dicta, all smack of the law, but not only their titles, their contents every now and again bring us many reminders of his liking for apposite technical phrases which come home to lawyers' business and bosoms. Thus, in his essay on Milton in the second series of Obiter Dicta, in dealing with certain portions of Paradise Lost, he says that "for Milton to essay to justify the ways of God to man was well and pious enough, but to represent God himself as doing so by argumentative process was not so well, and was to expose the Almighty to possible rebuff. The King is always present in his own courts, but as judge, not as advocate; hence the royal dignity never suffers. It is narrated of an eminent barrister, who became a most polished judge, Mr. Knight Bruce, that once, when at the very head of his profession he was taken in before a Master in Chancery . . . .

and found himself pitted against a little snip of an attorney's clerk, scarce higher than the table, who, nothing daunted, and by the aid of a bundle of books as big as himself, succeeded in worsting Knight Bruce, whom he persisted in calling over and over again 'my learned friend'. Mr. Bruce treated the imp with that courtesy which is always an opponent's due, but he never went before the Masters again."—*L.T., 1937, p. 300.*

Legal and Literary Allusions.—Disraeli the elder in his Curiosities of Literature has an interesting chapter on Quotation, in which he tells us that the art of quotation requires more delicacy in the practice than those conceive who can see nothing more in a quotation than an extract, and that to make a happy one is not easily done. Of the truth of this we are made familiar by countless examples in the pages of Mr. Birrell's books which come home to the judicious reader who is also a bookish person. Not very many, it may be supposed, nowadays become quite so dithyrambic as did Richardson's contemporaries when we are told that not only in this country was the excitement intense over his Clarissa; it was so also in France, Germany and Holland where Clarissa was gulped down. She even invaded the precincts of the law, for, as Mr. Birell told us, Serjeant Hill, though averse to literature, used to set Clarissa's will before his pupils and bid them determine how many of its uses and trusts could be supported in court. It appeared that in the learned Serjeant's opinion poor Clarissa, in addition to all her other misfortunes, died intestate. Again, in the essay on Dr. Doddridge, the noted Nonconformist and hymn writer, our attention is recalled to the fact that among his ancestors was Sir John Doddridge, a judge of the King's Bench in the Stuart period, regarding whom Fuller said that he was called "the sleeping judge" because he would sit on the bench with his eyes shut, which was only a posture of attention to sequester his thoughts from distracting objects, the better to listen to what was alleged and proved—an explanation as to which the essayist curtly adds that "this judicial habit of 'sequestration' still lingers on the bench, and is sometimes otherwise accounted for". But the old sleeping judge's name reminded the essayist that the authorship of Sheppard's Touchstone of Common Assurances has been attributed to Sir John Doddridge, and mention of this classic prompts the amusing addendum that 'if any of my readers are ever seized with a burning curiosity to discover what is an escrow, I can confidently refer him or her to Sheppard's Touchstone"—a pleasant quip which every lawyer will relish.—*L.T. 1937, p. 300.*

His Advice to Law Students.—At one time, it will be remembered, Mr. Birrell had a fair practice at the Chancery Bar both as a junior and when he became a silk. A very sound lawyer he was,

and knew how cases should be prepared and argued. A good many years ago, he delivered a lecture before the Liverpool Law Society on Legal Education, in which, after urging on his audience the importance of an historic study of the law, he warned them that much of the law to be found in the old reports owed its existence to the very conventional manner in which evidence was then admitted or rejected. "Nowadays," he went on, "judges are perfectly free to get at the real facts of any case that comes before them. When they have got at the facts or, at all events, thought they have got at them, or say they have got at them without thinking so, it is amazing how seldom any law is left. Get at the facts and most cases will decide themselves. It is painful to think how much subtle law has been manufactured upon a purely imaginary state of facts." No better advice could have been given to those beginning the study of the law and its practice.—*L.T., 1937, p. 300.*

Workmen's Compensation Cases.—Several years ago, in the course of some interesting reminiscences, the veteran Lord Dunedin recalled an incident in connection with the passage through the House of Commons of the Bill which eventually became the first Workmen's Compensation Act. As introduced, the Bill contained a clause prohibiting an injured workman, who proposed to claim compensation, from employing a paid lawyer. Lord Dunedin, then Mr. Graham Murray, was in charge of the Bill so far as its application to Scotland was concerned, and, being unsympathetic towards the exclusion of lawyers, he inserted a clause removing the embargo in proceedings north of the Tweed; but the immediate sequel was that—to use his own expression—he "got a wigging from Mr. Joseph Chamberlain for so doing", as, in that stateman's opinion, "there would be but little litigation arising out of the measure". Like many another forecast of what is likely to happen, this, as we all know, was singularly wide of the mark, and is evident in the yearly output of reports of cases involving the consideration of almost every section of the Act—reports whose headnotes fill column after column in the Digest. Only last week the House of Lords was called upon once again to solve the question whether the accidents giving rise to claims for compensation arose out of and in the course of the workmen's employment, and in both appeals this question was answered in the negative. Cases of this kind are largely questions of fact, but they are not, on that account, by any means easy of solution, as we may see by the frequency of divergent views entertained by the various tribunals before which they come—a curious commentary on Mr. Chamberlain's prophecy. —*S.J., 1937, p. 305.*

The Inheritance (Family Provision) Bill in Committee.—The committee stage of the Inheritance (Family Provision) Bill was concluded before a Standing Committee of the House of Commons

last Friday week. A new clause, which was accepted by the committee, provides, in effect, that the court in considering applications shall have regard to a testator's reasons for disinheriting or not making further provision for a spouse or child, and enables the court to accept such evidence of those reasons as it considers sufficient. By the same clause a statutory declaration by the testator of his reasons is to be accepted as *prima facie* evidence of the proof of the matters stated therein, whether of his motives or of the facts that influenced him. Mr. H. Strauss, who moved this amendment, stated that there were reasons which might make it perfectly proper for a testator to exclude a child from his will and instanced the case of a child who might have been provided for more than once, when it might be unjust to other members of the family if further provision were made for that child. Another new clause, also moved by Mr. Strauss will enable the court to vary an order in a downward direction if any new fact is brought to its notice. With regard to the courts before which applications under the new measure should come, it had been suggested that it might be well to exclude such cases from the county court for a limited period, and it may be noted in this connection that the Attorney-General withdrew an amendment which would have removed applications from the county court and undertook to consider the matter before the Report stage.—*S.J., 1937, p. 305.*

Ministerial Salaries.—The Ministers of the Crown Bill was read a second time in the House of Commons on Monday, an amendment to the effect that the House, while in favour of the removal of anomalies in Ministerial salaries provided that the aggregate charge was not increased, was of opinion that a reconsideration of the machinery of government and of the allocation of Ministers to departments should precede legislation of Ministerial remuneration, being defeated by a majority of 92 (228 votes to 136). We have already indicated, and do not propose to repeat, the main changes which the measure involves, but short reference may be made to matters of constitutional and legal importance ventilated in the course of the debate. Perhaps the most interesting of these is the appearance (on the assumption that the Bill passes the remaining stages) in a statute of the term "cabinet" for the first time, of "prime-minister" for the second time, and also the statutory association of the offices of premier and First Lord of the Treasury, thus affording legal recognition of a practice which, with minor interruptions, has obtained for some 100 years. Due prominence was given to these changes in the speech of the Home Secretary, who moved the second reading of the Bill, and whose words on the first point may be fittingly repeated here. In reference to cl. 3, Sir John Simon noted that for the first time in the history of the Constitution the word "cabinet" and the phrase

"cabinet minister" appeared. Hitherto, he said, there had been no means within the law of ascertaining who was a cabinet minister and who was not. Of course, a member of the cabinet was a member of the Privy Council, and if an individual had not previously been sworn of the Privy Council he would be sworn a member of the Privy Council when he was made a member of the cabinet. It was the solemn pledge by which he bound himself to guard cabinet secrets. Down to the present moment there was no provision in the law which either defined a cabinet minister or explained what he was. In future, the list of cabinet ministers would appear in the *London Gazette*, and the dates between which an individual was a cabinet minister would then be ascertained. Up to the present, all that had happened was that when a Prime Minister accepted from the Sovereign a commission to form a government, he submitted a list of ministers, at the top of which appeared those he professed to have as his cabinet colleagues, and the only way in which the dividing line was drawn was when you opened the paper the next morning and read "the above form the cabinet". It was, therefore, the Home Secretary said, an interesting moment in the historical and constitutional sense when Parliament this year for the first time took upon itself to define what a cabinet minister was.—*S.J., 1937, p. 305.*

Purposes of the Bill.—The same speaker pointed out that the Bill which followed the general lines of the recommendations of the Select Committees of the House of Commons, which reported in 1920 and 1930, had two purposes—the removal of anomalies in regard to the standing of certain administrative officers of State, and the simplification and improvement of the existing arrangements whereby ministers are distributed between the two Houses. On the latter point, he made reference to a statutory provision of the time of Queen Anne, designed to secure that there should not be in the House of Commons too many people who could be regarded as place men receiving pay as Ministers of the Crown. He drew attention to the special position of those sharing the Secretariate of State and to the distinction existing between Secretaries of State and Parliamentary Secretaries and to the difficulties to which the present somewhat complicated position had given rise. In regard to the other purpose of the Bill, attention was drawn to anomalies existing in regard to the salaries of the Secretary of State for Scotland, the Minister of Labour, and the Minister of Agriculture and Fisheries, while the desirability of equalising cabinet salaries was emphasised by reference to a recent statement by the Prime Minister who urged that it was altogether a wrong principle that there should be members of the cabinet receiving a certain sum as their salary and other members receiving 40 per cent. of that sum, in light of the fact that the cabinet was a body

of equals. The Prime Minister, Sir John Simon said, went on to point out that where a ministerial position carries a higher salary, it was naturally regarded as a more important position. That was the way of the world, and it was not in the interest of the best administration of the country that that should continue. Considerations of space forbid anything like an adequate treatment of other arguments advanced in favour of the Bill and demand a still more summary treatment of the views of the opposition, but it may, perhaps, be noted that according to Sir A. Sinclair, who agreed that certain ministers were underpaid, the Bill went far beyond the recommendations of the Select Committee with their suggestions for twelve ministers with salaries on the £5,000 level (not seventeen as under the Bill).—*S.J., 1937, p. 306.*

The Law Lords.—The last-named speaker, also, did not see why the law officers, who (as he said) when they left their party, returned to the Bar with enhanced prestige, should receive such large salaries and fees. Mr. Greenwood, "speaking as a layman," saw no reason why a lawyer, when he became a member of the Government, should receive fees in addition to his salary, and Mr. V. Adams (who thought that, if the salary which the Prime Minister was to receive was a proper one, the maintenance of the Lord Chancellor's salary was most improper), described the remuneration of the law officers as the most scandalous over-payment of all. Mr. Lees-Smith said that he had learned from inquiries among lawyers that there were very few in the legal profession who would not accept the position of a law officer and increase their salary by so doing, and suggested that the law officers expected a reversion to some highly-paid position like the Mastership of the Rolls, and pointed to the excellent example set by business men who entered the House and did not complain that nothing had been done for them because they did not get directorships. The Prime Minister, who did not think the occasion was one for pronouncement on the merits of the existing system of payment of law officers (who are not mentioned in the Bill), was more comforting. He had, he said, seen a great deal of the law officers in his time, and thought that the House had benefited from the experience of lawyers in the past. A *Times* leader on the Bill urged that so long as prizes open to the legal profession outside Parliament were so great, the effect of depriving the law officers of their fees would be to make those positions quite unattractive to lawyers of first rank, and with this observation our treatment of the subject may not inappropriately be concluded. —*S.J., 1937, p. 306.*

BOOK REVIEWS.

THE INDIAN COMPANIES ACT, third edition, by Kshetra Mohan Ghosh, Advocate, High Court, Calcutta, 1937. Price Rs. 10.

This is a comprehensive treatise on the Indian Companies Act. Since the appearance of the last edition of the book, the Indian Companies Amendment Act of 1936 was passed introducing a great number of far-reaching and important amendments to the Act of 1913. This has necessitated a re-writing of considerable portions of the book in the light of the amendments. The introduction at the opening gives a bird's eye view of the subject which will be useful to businessmen and beginners and students of law. Even in the introduction, the learned author has clearly pointed out the changes effected by the recent amendments to the Act. The commentaries of the Act as amended are full and the case-law has been brought up to date. The several appendices to the book give all the useful allied information. The numerous specimen forms given in the appendices will be found to be of special value to lawyers and businessmen. We have no doubt that the book will be found of great use by lawyers, judges and businessmen.

INDIAN LIMITATION ACT (ACT IX OF 1908) by Kumud Nath Bhaumik, B.A., B.L., with a foreword by the Honourable Mr. Justice Bijan Kumar Mukerji, M.A., B.L., of the Calcutta High Court, 1937. Price Rs. 5.

Mr. Bhaumik is familiar to lawyers as a writer on legal subjects. He has now brought out a Commentary on the Indian Limitation Act. The enactment is one on which there is a large growth of case-law every year and Mr. Bhaumik's book will be welcomed as an up to date text book on the Act. He does not rest content with giving references to the decided cases but sets out the principles underlying them. It is needless to say that even the latest amendments to the Act, such as Act XIV of 1937 have been incorporated in the book. There is a foreword to the book from the pen of Mr. Justice B. K. Mukerji of the Calcutta High Court. We have no doubt that the book will be found useful to the Bench and the Bar.

The above 2 books are published by the Eastern Law House, Calcutta.